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Criminal Sanctions in Accidental Oil Spill Cases—Punishment without a Crime

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I. INTRODUCTION

The recognized purposes of the criminal law are the prevention and punishment of anti-social conduct.[1] Those purposes are most often accomplished through the mechanisms of deterrence, education, rehabilitation and retribution.[2] Thus, for example, by implementing criminal sanctions in the environmental arena, "society endeavors to modify individual and institutional behavior to achieve high levels of compliance with environmental laws."[3]

Ordinarily, one is not guilty of a crime unless one has scienter—the criminal intent to commit the crime.[4] Writing for the *Morissette*

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1. *See* JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW (2d ed. 1960).
2. Susan L. Smith, *Shields for the King's Men: Official Immunity and Other Obstacles to Effective Prosecution of Federal Officials for Environmental Crimes*, 16 Colum. J. Envtl. L. 1, 5 n.13 (1991).
3. *Id.*
4. Morissette v. United States, 342 U.S. 246 (1952).

Court, Justice Jackson noted that the principle of scienter is deeply rooted in American legal philosophy:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.[5]

Because modern society believes man has the mental capacity to choose between good and evil, society generally punishes an offender only when he has chosen to do evil, and not when there is an absence of mental intent to cause harm.[6] Our criminal justice system thus is predicated upon the principle of individual free will.[7]

Nevertheless, the legislature is empowered to declare an act criminal regardless of the intent or knowledge of the actor.[8] Thus, it is not unconstitutional to deem a certain act a crime even if the act committed was an innocent mistake.[9] The legislature has not hesitated to utilize its power to create offenses in which criminal intent is not an element of the crime, particularly in the area of public welfare offenses.[10] Justice Jackson attributes this phenomenon in the *Morissette* case to the rise of the industrial revolution. He explains that the industrial revolution brought with it powerful and complex machinery and energy sources inherently dangerous to the public in general and workers in particular.[11] Those new resources required pervasive regulations to combat the ever-increasing dangers to public health, safety and welfare engendered by many of the burgeoning industries.[12] Believing that criminal sanctions were the most powerful form of regulation, lawmakers implemented not only strict civil liability, but strict *criminal* liability as well.[13]

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5. *Id.* at 250-51 (footnote omitted).
6. *Id.*
7. *Id.*
8. United States v. Balint, 258 U.S. 250, 252 (1922).
9. *Id.*
10. *See supra* note 4.
11. *Id.* at 253-54.
12. *Id.*
13. In *Morissette*, the Court explicitly noted:

> The industrial revolution multiplied the number of workmen exposed to injury from increasingly powerful and complex mechanisms, driven by freshly discovered sources of energy, requiring higher precautions by employers. Traffic of velocities, volumes and varieties unheard of came to subject the wayfarer to intolerable casualty risks if owners and drivers were not to observe new cares and uniformities of conduct. Congestion of cities and crowding of quarters called for health and welfare regulations undreamed of in simpler times. Wide distribution of goods became

The earliest examples of criminal penalties imposed in cases where scienter was not an element of the crime date back to the mid-nineteenth century.[14] The first is the conviction of a tavernkeeper who sold liquor to a habitual drunkard without knowing that the buyer was intoxicated.[15] Then came a set of rulings holding that a defendant could be convicted of selling adulterated milk in violation of a Massachusetts statute, even if the defendant did not know that the milk was tainted.[16] Contemporary public welfare offenses that lack a criminal intent requirement include the unintentional discharges of hazardous waste, such as crude oil.[17]

When applied to accidents occurring in the environmental arena, the behavioral effectiveness of criminal law mechanisms is dubious. Existing federal regulation has criminalized environmental accidents without regard to the behavioral intent of the actor.[18] Such legislation is troubling not only in light of the theoretical moorings of the criminal law, but also due to its wastefulness and impracticality.

The federal statutory scheme that governs environmental accidents provides for—in addition to criminal sanctions—extensive civil remedies in the form of civil and administrative penalties and provisions for payment of cleanup, restoration, and damages costs by the perpetrator of the accident.[19] Those statutory provisions are supplemented by common law and state remedies available to all of those

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> an instrument of wide distribution of harm when those who dispersed food, drink, drugs, and even securities, did not comply with reasonable standards of quality, integrity, disclosure and care. Such dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare.
>
> While many of these duties are sanctioned by a more strict civil liability, lawmakers, whether wisely or not, have sought to make such regulations more effective by invoking criminal sanctions to be applied by the familiar technique of criminal prosecutions and convictions.

Id. (footnotes omitted).

14. *Id.* at 256.
15. Barnes v. State, 19 Conn. 398 (1849).
16. Commonwealth v. Farren, 9 Allen 489 (1864); Commonwealth v. Nichols, 10 Allen 199 (1865); Commonwealth v. Waite, 11 Allen 264 (1865).
17. Clean Water Act, 33 U.S.C. § 1251-1387 (1988 & Supp. II 1990); (criminal provisions at §§ 1311(a) and 1321(b)); Rivers and Harbors Appropriation Act of 1899 ("Refuse Act"), 33 U.S.C. §§ 401-67 (1988 & Supp. II 1990)(criminal provisions at § 441); Migratory Bird Treaty Act, 16 U.S.C. §§ 701-18 (1988 & Supp. II 1990)(criminal provisions at § 703; penalties at § 707).
18. See Alan Saltzman, *Strict Criminal Liability and the United States Constitution: Substantive Criminal Law Due Process*, 24 WAYNE L. REV. 1571 (1978) for a vigorous challenge to the constitutionality of strict criminal liability. The constitutional challenge is rooted in the theories that strict criminal liability violates the Eighth Amendment bar against cruel and unusual punishment and that it denies substantive due process in that it contravenes the presumption of innocence.
19. *See, e.g.*, Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-61 (Supp. II 1990); Clean Water Act, 33 U.S.C. §§ 1251-1387 (1988 & Supp. II 1990).

injured by accidental oil spills.[20] In light of the extensive remedial scheme available in cases of oil spill accidents and for a variety of other policy reasons, such criminalization is inappropriate and wasteful. The civil and administrative remedies providing for cleanup and restoration are certainly sufficient and—in terms of encouraging environmental compliance—perhaps even more effective than criminal sanctions.

II. CRIMINAL PROSECUTION IN *UNITED STATES V. EXXON CORPORATION AND EXXON SHIPPING COMPANY*:[21] WHAT ABOUT CRIMINAL INTENT?

A case study of the Exxon Valdez prosecution demonstrates the inappropriateness of criminal prosecution for accidental oil spills. The Exxon defendants were subjected to multiple charges without any existing evidence of intent to pollute.[22] This is an obvious challenge to the traditional principles of criminal law.[23]

The indictment against Exxon Corporation and Exxon Shipping Company included charges under three statutes that lacked traditional criminal intent provisions: The Clean Water Act,[24] the Refuse Act,[25] and the Migratory Bird Treaty Act.[26] The Clean Water Act allows conviction for negligent behavior,[27] and the other two statutes impose strict criminal liability.[28]

Under the Clean Water Act, anyone who "negligently" discharges pollutants, including crude oil, into navigable waters, is subject to criminal penalties.[29] The culpability element is, thus, a very low one.[30] A negligent violator of the Clean Water Act is punishable by a

20. *See, e.g.* 33 U.S.C. § 2718(a)(1)(Supp. II 1990) and 33 U.S.C. § 1321(o)(1988 & Supp. 1990)(stating that the Oil Pollution Act of 1990 and the Clean Water Act do not preempt state remedies for oil discharges); International Paper Co. v. Ouelette, 479 U.S. 481 (1987)(holding that the Clean Water Act does not preempt common law claims unless they conflict with the Clean Water Act).
21. United States of America v. Exxon Corp., No. A90-015 CR (D. Ala. filed Feb. 27, 1990).
22. Eva M. Fromm, *Commanding Respect: Criminal Sanctions for Environmental Crimes,* 21 ST. MARY'S L.J. 821, 824 (1990).
23. While environmental statutes with a criminal intent requirement do exist, the purpose of this Article is limited to a review and structured criticism of the use of criminal law where the actor lacked scienter.
24. 33 U.S.C. §§ 1251-1387 (1988 & Supp. II 1990).
25. 33 U.S.C. §§ 401-67 (1988 & Supp. II 1990).
26. 16 U.S.C. §§ 701-18 (1988 & Supp. II 1990).
27. 33 U.S.C. § 1319(c)(1)(1988 & Supp. II 1990).
28. 16 U.S.C. § 707(a)(1988) and 33 U.S.C. § 411 (1988).
29. *See supra* note 28.
30. Under the *Model Penal Code*, § 2.02(2)(d)(Official Draft 1985) an offense is committed negligently if the defendant's conduct constitutes a "gross deviation from the standard of care that a reasonable person would observe in the actor's situation."

fine of not less than $2500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both.[31] The punishment for repeat violators is more severe.[32]

The Rivers and Harbors Appropriation Act of 1899,[33] commonly known as the "Refuse Act," makes it unlawful "to throw, discharge, or deposit . . . any refuse matter of any kind or description whatever . . . into any navigable waters of the United States."[34] Section 16 of the Refuse Act provides for a misdemeanor penalty of up to one year imprisonment and/or a fine of up to $2500 for discharge of any refuse matter into the navigable waters of the United States.[35] The deposit of refuse in navigable waters has been held to be a strict liability crime.[36]

The Migratory Bird Treaty Act[37] makes it unlawful to pursue, hunt, take, capture or kill, or to attempt to pursue, hunt, take, capture or kill any migratory bird or any part, nest, or egg of any migratory bird named in certain international conventions unless permitted to do so by the regulations implementing the Act.[38] Any person, association, partnership, or corporation that violates the Act or the international conventions to which it refers is subject to a misdemeanor conviction and a fine not exceeding $500 and/or not more than six months imprisonment.[39] A violator can only be penalized for each act or incident constituting a violation, rather than for each dead bird resulting from such an act or incident.[40]

The majority of circuit courts that have ruled on the issue have concluded that the misdemeanor provision of the Migratory Bird

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31. 33 U.S.C. § 1319(c)(1)(1988 & Supp. II 1990).
32. *Id.*
33. *See supra* note 26.
34. 33 U.S.C § 407 (1988).
35. The Refuse Act states:

> Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of . . . this title shall be guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment . . . .

33 U.S.C § 411 (1988).
36. U.S. v. Ashland Oil Inc., 705 F. Supp. 270, 276 (W.D. Pa. 1989).
37. *See supra* note 27.
38. 16 U.S.C. § 703 (Supp. II 1990).
39. 16 U.S.C. § 707(a)(1988).
40. United States v. Corbin Farm Serv., 444 F. Supp. 510, 531 (E.D. Cal. 1978)("[I]f Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses." (quoting Bell v. United States, 349 U.S. 81, 84 (1955))). The Ninth Circuit affirmed and adopted this part of the decision as its own in United States v. Corbin Farm Serv., 578 F.2d 259 (9th Cir. 1978).

Treaty Act is a regulatory measure designed to protect the public welfare, thus precluding any basis for judicial inference that intent need be shown.[41] In *United States v. Catlett*,[42] for example, the Sixth Circuit upheld the convictions of a number of dove hunters who, in violation of the Act, were found unintentionally hunting in a baited field. The hunters were convicted despite an absence of evidence "tending to show that any of the defendants either baited the field, or knew that it was baited at any time."[43] The Court explained:

> The law is, unhappily for defendants, established that scienter is not required for a conviction. We concede that it is a harsh rule and trust that prosecution will take place in the exercise of sound discretion only. It is for Congress and the Secretary of the Interior to establish and change the policies here involved.[44]

The application of the Migratory Bird Treaty Act to oil spill cases is likely a far reaching interpretation of the statute, which was not intended by Congress. The legislative history of the 1960 amendment to the Act speaks of the amendment as authorizing "more severe penalties for . . . market hunters . . . ." [45] The language clearly suggests that the statute was intended to punish and deter hunters who *target* birds—not those who suffer accidents that involve the remote conse-

41. *See* United States v. Engler, 806 F.2d 425 (3d Cir. 1986)(dealer of migratory bird parts convicted for violation of Migratory Bird Treaty Act without proof of scienter), *cert. denied*, 481 U.S. 1019 (1987); United States v. Catlett, 747 F.2d 1102 (6th Cir. 1984)(dove hunters convicted for unintentionally hunting in a baited field in violation of the Act without proof of criminal intent), *cert. denied*, 471 U.S. 1074 (1985); United States v. Brandt, 717 F.2d 955 (6th Cir. 1983)(defendants convicted of violating regulations promulgated under the Migratory Bird Treaty Act, which prohibited the taking of migratory birds by aid of baiting, and scienter was determined not to be an element of the crime); United States v. FMC Corp., 572 F.2d 902 (2d Cir. 1978)(conviction without proof of criminal intent was based on the death of water fowl resulting from the improper pre-treatment of toxic residue which was discharged into a wastewater pond frequented by water fowl); United States v. Green, 571 F.2d 1 (6th Cir. 1977)(defendant convicted of violating regulation prohibiting the taking of mourning doves "on or over any baited area" even though he did not know the field over which he hunted was baited); United States v. Ireland, 493 F.2d 1208 (4th Cir. 1973)(defendant convicted for aiding and abetting the taking of migratory birds with the aid of bait on and over a baited area without proof that defendant knew the area was baited); United States v. Jarman, 491 F.2d 764 (4th Cir. 1974)(defendants convicted of hunting migratory birds over a baited area in violation of Migratory Bird Treaty Act without proof of scienter); Rogers v. United States, 367 F.2d 998 (8th Cir. 1966)(defendant convicted of unlawful sale or possession of wild ducks and geese, and proof of guilty knowledge or intent to commit a violation was held to be unnecessary in a prosecution under the Migratory Bird Treaty Act), *cert. denied*, 386 U.S. 943 (1967).

42. 747 F.2d 1102 (6th Cir. 1984), *cert. denied*, 471 U.S. 1074 (1985).

43. *Id.* at 1103-04.

44. *Id.* at 1105 (footnote omitted).

45. S. Rep. No. 1779, 86th Cong., 2d Sess. 1 (1960), *reprinted in* 1960 U.S.C.C.A.N. 3459.

quence of bird deaths.[46]

In the plea agreement filed on September 30, 1991, Exxon Shipping Company pled guilty to three misdemeanor charges under the Clean Water Act, the Refuse Act, and the Migratory Bird Treaty Act.[47] Exxon Corporation pled guilty to one misdemeanor under the Migratory Bird Treaty Act.[48] All charges arose from the accidental discharge of oil in Prince Williams Sound on March 24, 1989.[49] It was undisputed that Exxon Corporation and Exxon Shipping Company had no criminal intention in conjunction with the accident.[50]

Criminal prosecutions of environmental accidents serve neither the purpose of deterrence nor the purpose of removing dangerous elements from society. Severe deterrence already is built into the extensive civil regulatory scheme that governs environmental abuses. Moreover, since the perpetrators of major environmental accidents generally are companies rather than individuals, the sanction unique to the criminal justice system—namely imprisonment—is rarely, if ever, imposed. Rather, the violator is punished via criminal fines that are often imposed alongside harsh civil penalties. Criminal actions thus frequently invite expensive and duplicative litigation costs because defendants are most often subject to both criminal and civil law actions. Such duplication generates enormous costs between the parties without necessarily enhancing environmental protection.

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46. The application of the Migratory Bird Treaty Act to oil spill accidents was in fact unprecedented before the Exxon Valdez oil spill. All of the prior cases which have construed the Migratory Bird Treaty Act to impose strict criminal liability have done so only where a defendant intentionally engaged in conduct designed to kill migratory birds or to profit from their sale, albeit supposedly under the regulatory exceptions to the statute, or has released toxic substances in areas where it knew or should have known that they could pose a significant threat to migratory birds. Hence, in all these cases, there was some intentional act on the part of the defendant. No prior case has convicted a defendant for purely accidental behavior, such as the accidental discharge of oil. *See supra* note 41 for examples of prior cases in which defendants were convicted without proof of scienter for violation of the Migratory Bird Treaty Act.

47. Plea agreement at 2, United States of America v. Exxon Corp., No. A90-015 CR (D. Ala. filed Sept. 30, 1991).

48. *Id.*

49. *Id.* at 2-3.

50. The plea agreement makes no mention of the Exxon defendants' acting with any knowledge, willfulness, or intent.

III. CRIMINAL PENALTIES IN CASES OF OIL SPILL ACCIDENTS ARE SUPERFLUOUS IN LIGHT OF THE CIVIL LAW REGULATIONS AND REMEDIES THAT GUARD AGAINST ENVIRONMENTAL ABUSES

The *Exxon Valdez* case[51] supports the argument that civil remedies, rather than criminal prosecutions, best protect society from accidental oil spills. In addition to being criminally prosecuted, Exxon has been sued under a myriad of civil law provisions.[52] The regulatory body of environmental law provides a pervasive remedial scheme for oil spill accidents. The scheme includes common law remedies, state law remedies, and several federal statutes that provide for civil penalties, administrative penalties, and the payment of cleanup costs and environmental restoration costs.[53] A review of that civil remedy scheme is now warranted.

Under federal maritime law, a vessel owner is liable in the case of unintentional torts for all direct losses sustained by those who suffer personal injury or who have a proprietary interest in property physically damaged by the negligence of the defendant.[54] The law provides, however, that there can be no recovery in tort for downstream financial losses that are not incident to personal injury or property damage.[55] Under the common law, therefore, plaintiffs cannot recover for monetary losses that occur as a collateral consequence of maritime torts, such as lost economic opportunity.[56]

The federal statutory scheme pertaining to remedies for accidental discharge of oil is also extensive. In March 1989, at the time of the Exxon Valdez oil spill, the Clean Water Act governed most cases of oil spill cleanup and liability.[57] In light of the Valdez spill, Congress determined that the Clean Water Act set inappropriately low limits of liability for vessel owners and operators.[58] Accordingly, it enacted the Oil Pollution Act of 1990,[59] which enhances the remedial scheme al-

51. *See supra* note 21.
52. *See, e.g.*, Alaska v. Exxon Corp., No. A91-083 CIV (Consolidated Case No. A89-095 Civil)(D. Alaska filed Mar. 15, 1991), in which the State of Alaska sued the Exxon defendants under the Clean Water Act, 33 U.S.C. § 1321(f)(1988), and Sea Hawk Seafoods, Inc. v. Exxon Corp., No. A89-095 CIV. (D. Ala. filed Mar. 30, 1989), in which the defendants were sued under several admiralty theories including trespass and public nuisance and under several Alaska statutes including ALASKA STAT. § 46.03.822 (1991) and ALASKA STAT. § 09.45.230 (1991).
53. *See supra* notes 19 and 20.
54. *Cf.* Robins Drydock & Repair Co. v. Flint, 275 U.S. 303 (1927).
55. *See* East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986).
56. *Id.*
57. 33 U.S.C. § 1321 (1988)(amended Supp. II 1990).
58. S. Rep. No. 94, 101st Cong., 2d Sess. 3 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 724.
59. 33 U.S.C. §§ 2701-2761 (Supp. II 1990).

ready in place under the Clean Water Act. The Act relies on Section 1321 of the Clean Water Act for providing the basic law for cleanup authority, penalties for spills and a strict liability standard.[60]

The Oil Pollution Act of 1990 caps liability at $1200 per gross ton for vessels weighing more than 3 million gross tons or $10 million, whichever is greater, for tankers carrying oil in bulk or commercial quantities as cargo.[61] That limitation is far higher than the liability lid of the Clean Water Act, which was set at $150 per gross ton of the vessel or $250,000, whichever was greater.[62] The responsible party is liable up to the limitation for all removal costs incurred by the United States, a state, or an Indian tribe.[63] In addition, the Act permits the federal or state government's recovery of costs incurred in the restoration of natural resources damaged as a result of an oil spill.[64] Under the legislation, owners and operators are likewise liable for: economic damages including injury to real or personal property; impairment of earning capacity resulting from injury to real or personal property; and any direct or indirect loss of tax, royalty, rental, or net profit shares revenue by the United States, a state, or political subdivision for not more than one year.[65]

The limitation on liability is removed if the discharge was proximately caused by "gross negligence or willful misconduct" or the "violation of an applicable Federal safety, construction, or operating regulation" by the responsible party.[66] Defenses to liability are limited to an act of God, an act of war, or an act or omission of a third party.[67]

The Act also establishes an Oil Spill Compensation Fund to pay for removal and damage costs from an oil spill. The limit is $1 billion per incident.[68] The compensation fund replaces several other funds, including the $100 million fund that was available under the Trans-Alaska Pipeline Authorization Act[69] for discharges—such as the Valdez spill—that occurred before August 18, 1990, and involved oil transported through the Trans-Alaska Pipeline.[70]

The fund is available to provide a source of compensation for claims that are not settled by the discharger due to the liability limit

60. S. Rep. No. 94, 101st Cong., 2d Sess. II (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 732-33.
61. 33 U.S.C. § 2704 (Supp. II 1990).
62. 33 U.S.C. § 1321(f)(1)(1988).
63. 33 U.S.C. § 2702(b)(1)(Supp. II 1990).
64. 33 U.S.C. § 2702(b)(2)(A)(Supp. II 1990).
65. 33 U.S.C. § 2702(a) & (b)(Supp. II 1990).
66. 33 U.S.C. § 2704(c)(1)(Supp. II 1990).
67. 33 U.S.C. § 2703 (Supp. II 1990).
68. 26 U.S.C. § 9509(c)(2)(A)(Supp. II 1990).
69. 43 U.S.C. § 1651-55 (1988 & Supp. II 1990).
70. 43 U.S.C. § 1653(c)(3) & (5)(1988 & Supp. II 1990).

or a defense.[71] The fund also is designed to provide a source of money immediately available for cleanup activities or damage compensation if the spiller does not act promptly.[72] If used for that purpose, the fund would be subrogated to all rights against the spiller for all expenditures up to the extent of the discharger's liability.[73] In addition, the fund provides compensation for cases in which the spiller cannot be identified or located or is judgment proof.[74]

The Oil Pollution Act also amends the Clean Water Act by increasing the amount of civil penalties that can be imposed upon a spiller. Civil penalties of up to $25,000 may be assessed for Class I violations and up to $125,000 may be assessed for Class II violations.[75] Civil administrative penalties of an equal amount are also provided for by the Clean Water Act.[76] The statute, however, expressly states that civil and administrative penalties may not both be assessed under the Clean Water Act for the same violation.[77]

The Oil Pollution Act and the Clean Water Act do not preempt many remedies under state law.[78] The Oil Pollution Act explicitly

71. 33 U.S.C. § 2712(a)(Supp. II 1990). *See also supra* note 58 for legislative history.
72. 33 U.S.C. § 2712(d)(Supp. II 1990).
73. 33 U.S.C. § 2712(f)(Supp. II 1990).
74. 33 U.S.C. § 2712(Supp. II 1990).
75. 33 U.S.C. § 1321(b)(6)(B)(1988 & Supp. II 1990).
76. 33 U.S.C. § 1319(g)(2)(1988).
77. 33 U.S.C. § 1321(b)(6)(E)(1988 & Supp. II 1990).
78. It should be noted, however, that state law remedies may be limited by federal law in some instances. In Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917), the Court struck down a New York comprehensive workman's compensation statute that barred ships from loading or discharging cargo on New York docks without complying with the statute's provisions on the ground that the state law significantly impeded freedom of navigation between the states and foreign countries. The Court stated: "[N]o such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." *Id.* at 216. State common law, like state statutes, may also have to yield to contrary maritime principles. In Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953), the Court refused to apply a Pennsylvania common law rule under which a plaintiff's contributory negligence wholly barred an injured person from recovery for an injury suffered on navigable waters. The Court reasoned that the Pennsylvania rule contravened modern admiralty principles and held that "[w]hile states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court." *Id.* at 409-10 (footnote omitted). Similarly, in Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986) the Court stated that "the extent to which state law may be used to remedy maritime injuries is constrained by a so-called 'reverse-*Erie*' doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards." *Id.* at 223. In International Paper Co. v. Ouellette, 479 U.S. 481 (1987), the Court applied this principle specifically to the Clean Water Act and stated that the statute allows for state common law claims only to the extent that

states that it does not preempt any state from imposing additional liability with respect to the discharge of oil within the state or with respect to its removal.[79] The Clean Water Act contains an almost identical provision.[80]

In *Askew v. American Waterways Operators, Inc.*,[81] the Supreme Court upheld a Florida oil spill cleanup law providing for the state's recovery of cleanup costs and imposing liability without fault for any oil spill damages incurred by the state or private persons.[82] The Court explicitly stated that the Clean Water Act "does not preclude, but in fact allows, state regulation" over oil spill cleanup.[83] In *Askew*, the Court further stressed that the states were free to impose liability for damages suffered by the states and their private citizens above and beyond the liability for cleanup costs imposed by the Clean Water Act.[84]

It has likewise been held that the Clean Water Act does not eliminate the state's right to punish dischargers through the imposition of statutory civil penalties.[85] In *Complaint of Allied Towing Corp.*,[86] the court ruled that "nothing in the FWPCA [Clean Water Act] precludes the states from imposing civil penalties upon vessel owners or operators who violate state statutes by discharging oil illegally."[87]

The Supreme Court has further held that the Clean Water Act

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they do not obstruct the full implementation of the Clean Water Act. The Court stated that a state law is invalid whenever it conflicts with a federal statute by standing as an impediment to the execution of the goals and purposes of Congress. *Id.* at 491-92.

79. The Oil Pollution Act states:

> Nothing in this Act . . . shall —
> (1) affect, or be construed or interpreted as preempting, the authority of any state or political subdivision thereof from imposing any additional liability or requirements with respect to —
> (A) the discharge of oil or other pollution by oil within such a State; or
> (B) any removal activity in connection with such a discharge.

33 U.S.C. § 2718(a)(1)(Supp. II 1990).

80. Section 1321(*o*) of the Clean Water Act provides in relevant part:

> (2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State,or with respect to any removal activities related to such discharge.
> (3) Nothing in this section shall be construed . . . to affect any state or local law not in conflict with this section.

33 U.S.C. § 1321(*o*)(1988 & Supp. II 1990).

81. 411 U.S. 325 (1973).
82. *Id.* at 328.
83. *Id.* at 329.
84. *Id.* at 336.
85. *See In re* Complaint of Allied Towing Corp., 478 F. Supp. 398 (E.D. Va. 1979).
86. *Id.*
87. *Id.* at 403.

does not preempt state common law claims that do not obstruct the full implementation of the Clean Water Act.[88] The *Ouellette* case involved state common law claims brought by private property owners.[89] The plaintiffs filed suit in Vermont state court, under the Vermont common law of nuisance, against operators of a paper mill alleged to have discharged pollutants into a lake.[90] The court's holding can most likely be applied to similar claims brought by the state government.

Because the Oil Pollution Act of 1990 is based upon the Clean Water Act,[91] decisions that explicate the Clean Water Act's preemption provision can likely be extended to apply to the almost identical provision contained in the Oil Pollution Act. The legislative history of the Oil Pollution Act specifically refers to the Clean Water Act's preservation of more stringent state laws.[92] The legislative history notes that, at the time of its writing, twenty-four states had enacted comprehensive oil pollution laws. The history explicitly asserts that the Oil Pollution Act "would permit such State laws to continue and would not preclude enactment of new State laws."[93]

The existing common law and statutory scheme provide a wide variety of remedies for private plaintiffs, the federal government, and state governments. The remedies provide not only restitution for injured parties, but also—in the form of harsh civil and administrative fines—a formidable deterrent against potential carelessness on the part of vessel and cargo owners. The criminalization of oil spill accidents without a scienter requirement is therefore duplicative, wasteful and intuitively unfair. The criminal provisions of the statutes serve neither the purpose of necessary deterrence, nor the purpose of removing from the streets dangerous elements of society. In addition, criminal sanctions do not encourage institutional change not already fostered through civil law provisions.

IV. OTHER LEGAL AND POLICY ARGUMENTS THAT MILITATE AGAINST THE CRIMINALIZATION OF ACCIDENTAL OIL SPILLS

While the existence of civil and administrative penalties that make criminal penalties superfluous is one argument militating against the criminalization of oil spill accidents, it is certainly not the only one.

88. International Paper Co. v. Ouellette, 479 U.S. 481, 497 (1987).
89. *Id.* at 484.
90. *Id.*
91. S. REP. NO. 101st Cong., 2d Sess. 9 & 11 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 730 & 732.
92. *Id.* at 6.
93. *Id.*

Other legal and policy arguments support the proposition that environmental accidents should not be criminalized.

The *Morissette* opinion[94] sought to justify the imposition of criminal penalties in certain cases of public welfare violations where no criminal intent was shown on the ground that in such cases "penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation."[95] Although justification of strict criminal liability based on the relative leniency of the penalty does not eliminate the constitutional and philosophical problems arising out of the lack of a scienter requirement,[96] the *Morissette* reasoning has set an important precedent. That reasoning was applied by the Sixth Circuit in *United States v. Wulff*.[97] In *Wulff*, the defendant was charged under the felony section of the Migratory Bird Treaty Act for offering to sell migratory bird parts.[98] In affirming the district court's dismissal of all charges, the Sixth Circuit found that the felony penalty of the Migratory Bird Treaty Act[99]—which, like its misdemeanor provisions, contained no scienter requirement—violated due process. The court reasoned that a maximum penalty of two years' imprisonment and/or a fine of $2000 was severe and would irreparably damage one's reputation.[100] Thus, under *Morissette*[101] and *Wulff*,[102] criminal sanctions should not be pursued unless intent is an element of the crime in cases where (1) the penalty to be imposed is harsh, and (2) the defendant's reputation will be significantly besmirched as a result of prosecution.

Applying that reasoning, the criminalization of oil spill accidents caused by large corporations is arguably unconstitutional. Although the defendants in the *Exxon Valdez* case, Exxon Corporation and Ex-

94. Morissette v. United States, 342 U.S. 246 (1952).

95. *Id.* at 245; *See also* Frances B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933)(arguing that criminal sanctions must require a mens rea element if the penalty is severe, and particularly when the penalty involves imprisonment.)

96. *See supra* note 19.

97. 758 F.2d 1121 (6th Cir. 1985).

98. *Id.* at 1122.

99. 16 U.S.C. § 707(b)(1988), which formerly read as follows:

> (b) Whoever, in violation of this subchapter, shall—
>
> * * *
>
> (2) sell, offer for sale, barter or offer to barter, any migratory bird shall be guilty of a felony and shall be fined not more than $2,000 or imprisoned not more than two years, or both.

This provision was amended on November 10, 1986, by Pub.L. 99-645, Title V § 501 and now requires that the defendant act "knowingly."

100. United States v. Wulff, 758 F.2d 1121, 1125 (6th Cir. 1985). The court did not extend its ruling to the Act's misdemeanor provision on the theory that the penalty and the damage to an offender's reputation if convicted of a misdemeanor is not as great as in the case of a felony conviction.

101. 342 U.S. 246 (1952).

102. 758 F.2d 1121 (6th Cir. 1985).

xon Shipping Company, pled guilty only to misdemeanor charges, they were assessed a combined fine of $150 million.[103] Without question, the penalty imposed on the Exxon defendants is both large and harsh. Moreover, the notoriety gained by a corporation subject to criminal charges can cause irreparable damage whether the indictment be for a felony or a misdemeanor. Exxon is prominent in the public eye, and the criminal prosecution of such a corporation is a much-publicized event. Such publicity can have ruinous consequences for the defendant's business. Under *Morissette* and *Wulff*, it is thus arguable that the criminal prosecution of large corporations for oil spill accidents in which scienter is absent amounts to an inappropriate compromise of constitutional due process protections.

Additionally, the criminalization of oil spill accidents is inconsistent with the legislature's treatment of other public welfare accidents.[104] Congress has not extended the application of criminal sanctions to other accidents of equal or greater destructiveness. The law, for example, provides no criminal penalty for an airline when one of its planes crashes, killing everyone on board.[105] Nor is there a criminal penalty awaiting a train company when one of its trains collides and causes extensive injury and death.

Furthermore, criminal penalties propagate waste of government and corporate resources. Under current law, the Department of Justice prosecutes cases that are at the same time being handled through the channels of the civil law.[106] The federal government is thus re-

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103. Plea agreement at 6, United States of America v. Exxon Corp., No. A90-015 CR (D. Alaska filed Sept. 30, 1991). The Criminal Fines Improvement Act of 1987, 18 U.S.C. § 3571(c)(1988 & Supp. II 1990), vests courts with discretion to increase the fine of organizations found guilty of a criminal offense. The Act does so by classifying an offense according to the maximum term of imprisonment the law permits for its violation and then increasing the fines available for each class of offense. Thus, even a relatively small misdemeanor penalty can become quite large if imposed upon an organization.

Of the $150 million assessed fine, $125 million was remitted and $25 million was paid by the defendants.

104. In his comments at the Exxon defendants' sentencing hearing dated April 24, 1991, Judge H. Russell Holland stated as follows:

> Congress in the sentencing guidelines has told us, the courts, that we must do better in avoiding disparity in sentencing. I suggest that congress has some work of its own to do in getting the disparity out of the criminal laws for, as I see it, we are affording greater protection to birds and sea otter that aren't even good for food than we are people, and I think that's some pretty serious disparity.

Transcript of hearing at 5-6.

105. When a Northwest Airlines plane crashed in Detroit several years ago because the pilot had failed to adjust the wings to the correct takeoff position, Northwest Airlines was not prosecuted despite the fact that hundreds of lives were lost and that only one four-year-old girl survived the tragedy.

106. *See, e.g.* Clean Water Act 33 U.S.C. §§ 1251-1387 (1988 & Supp. II 1990), which provides for both civil remedies and criminal prosecution.

quired to divert monetary and human resources away from other criminal matters such as drug prosecution and the savings and loans crisis. The prosecuted corporation is likewise forced to expend on criminal defense millions of dollars that would better be spent on cleanup and restoration measures. In light of astronomical defense costs, the corporation may be reluctant to engage in as much voluntary cleanup and restoration as it would otherwise. In the *Exxon Valdez* case,[107] both Exxon and the government spent untold millions of dollars over a two-year period in conjunction with the criminal case before the case finally settled.

The decision to press criminal charges against a defendant where administrative or civil actions would be equally appropriate may often be politically motivated. Criminal prosecutions in environmental cases attract publicity and appease the public, which, fortunately, has become increasingly sensitive to environmental issues.[108] The cynic may thus accuse some prosecutors of pursuing criminal indictments in cases of environmental accidents for purposes of currying favor with the voting public and for personal career advancement.

The criminalization of oil spill accidents may actually deter the shipping industry to the point of crippling its competitive existence. American shipping has become a shrinking industry in recent years.[109] The number of active, U.S.-flagged ocean-going vessels of more than 1,000 gross tons has fallen from 1,082 in 1950 to 377 in 1991. The number may fall below 100 by the end of the decade.[110] Those numbers compare with 1,400 equivalent ships flying Japanese colors in 1991.[111] The total capacity of the U.S. fleet has dropped by thirty-three percent between 1950 and 1991,[112] and the number of marine jobs in the privately owned active fleet has fallen from 42,000 in 1970 to 10,000 in 1991.[113] The fear of criminal prosecution for accidental oil discharges and the daunting precedent set by the *Exxon Valdez* case[114]

107. United States of America v. Exxon Corp., No. A90-015 CR (D. Ala. filed Feb. 27, 1990).

108. Fromm, *supra* note 22, at 823.

109. Ken Miller, *Concern Grows Over U.S. Free Fall as Maritime Power*, Gannett News Service, September 26, 1991, *available in LEXIS*, Nexis Library, Wires File.

110. *Id.*

111. *Id.*

112. Lee Smith, *Lessons From the Rush to the Gulf*, FORTUNE, January 28, 1991, at 86.

113. *Three Maritime Unions Issue Joint Statement; Call for All-Out Cooperative Effort to Revitalize U.S. Fleet*, PRNewswire, Sept. 9, 1991, *available in* Westlaw, PRNews database. The article also quotes the heads of three major maritime unions as asserting the following in their joint statement:

> The reality is painfully clear: America's privately owned merchant fleet continues its dangerous slide, a victim of national neglect and apathy, with even the industry itself seemingly unmoved by the potential consequences.

114. United States of America v. Exxon Corp., No. A90-015 CR (D. Ala. filed Feb. 27, 1990).

may constitute an added shackle to an already seriously ailing industry.

V. CONCLUSION

The criminalization of oil spill accidents constitutes a departure from the traditional functions of criminal sanctions due to the lack of a scienter element in such cases. Existing civil law provides adequate deterrence, retribution and compensatory measures. Criminal prosecution in unintentional oil spill cases is thus unnecessary, wasteful, and ultimately may even have deleterious rather than positive effects on American industry and commerce.